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April 29, 2011

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov

Re: Comment Letter – Draft Industrial General Permit: Submitted on behalf of California Coastkeeper Alliance and California Sportfishing Protection Alliance

Dear Ms. Townsend and State Board Members,

On behalf of California Coastkeeper Alliance ("CCKA"), which represents 12 Waterkeepers spanning the coast from the Oregon border to San Diego,[1] and California Sportfishing Protection Alliance ("CSPA") (collectively ("CCKA")), we are pleased to finally see the long-awaited draft permit proposing to update the 14-year old general permit for storm water discharges associated with industrial facilities in California. Although CCKA believes that the existing permit has made some significant strides in bringing industrial storm water pollution under control around the state, CCKA strongly disagrees that few "low-hanging fruit" remain, as urged by the California Association of Stormwater Quality Agencies ("CASQA") and other dischargers at the recent hearing and workshops hosted by the State Board and its staff. More than any other entities in the State – including even the regional boards' combined storm water staffs – the California Waterkeepers, California Sportfishing Protection Alliance and other environmental organizations have reviewed, inspected, negotiated best management practices ("BMPs") and monitored industrial facilities discharging storm water since the original permit in 1991. Our collective on-the-ground experience walking and assessing facilities indicates that many facilities still hope to get by with the barest of "BMPs," even after they have measured for many years pollution levels well above EPA's benchmark values or applicable water quality standards. Our experience further indicates that the primary reason for the significant percentage of facilities pointed out by CASQA as exceeding EPA's benchmark values is because facilities have failed to implement best available technology economically achievable ("BAT"). Hence, it

[1] The referenced Waterkeepers are: Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper, Inland Empire Waterkeeper, and San Diego Coastkeeper.

is our consistent and direct experience from these years of enforcement efforts that numerous actions remain to be taken to ensure that the permit protects water quality and complies with the law.

CCKA, its member Waterkeepers and allies have put their collective experience together to develop these comments on the proposed draft permit. CCKA also has retained Matt Hagemann, P.G., Ch.G., of SWAPE, to review some of the technical components of the proposed permit, in particular the proposed numeric effluent limitations and their consistency with the Federal Water Pollution Control Act's ("Act" or "CWA"), 33 U.S.C. § 1251 *et seq.*, BAT, and best conventional pollutant control technology ("BCT") requirements. Our comments are summarized as follows:

- Contrary to the arguments by many of the dischargers, the State Board is entirely justified in establishing numeric BAT/BCT effluent limitations based on limits equivalent to EPA's published benchmark values. CCKA looks forward to reviewing the completed BAT/BCT analysis being prepared by staff.

- Ample monitoring data exists on which the State Board can rely in assessing the statutory criteria for establishing BAT and BCT-based numeric effluent limitations.

- A technical review of media treatment systems currently used by the best performers and adjustable to all industrial storm water facilities shows that compliance with staff's proposed numeric effluent limitations ("NELs") is feasible and reasonably expected to be achieved by the best performing facilities.

- CCKA agrees that a daily average may be applied to measure compliance with numeric BAT/BCT effluent limitations.

- The State Board should clarify that monitoring for compliance with applicable water quality standards must be located at the point where discharges leave a facility.

- The Permit should require analysis of the dissolved fraction of metals present in discharges.

- The Proposed corrective action levels improperly delay implementation of BAT/BCT. Level 1 operational source control should already have been accomplished and cannot reasonably be described as "over and above" minimum BMPs. At a minimum, Level 2 structural and/or treatment controls already should be implemented by all industrial facilities in order to have achieved BAT/BCT. Numeric effluent limitations must be established now, without the proposed three-year compliance schedule. And, even assuming there is a logical place for corrective action levels in the permit, the proposed scheme's various loopholes should be closed.

- Because the State Board has no authority to exclude any industrial activities from the permitting requirements, the Board needs to clarify that the permit is not limited to the listed SIC industrial categories but rather extends to any industrial activities. The State Board also should specify other SIC categories that pose significant pollution threats or are plainly industrial in nature.

- BMPs designed to only a 10-Year, 24-Hour storm event are not BAT/BCT. A 25-year, 24-hour compliance storm event is reasonably achievable by the best performing facilities.

- The Permit should not contain any exclusions based upon the implementation of LID or other measures that may not prove effective in most industrial contexts.

- The Permit's proposed monitoring scheme should be strengthened. Four samples should be required during the rainy season rather than spread out over the entire year. The expectation that all facilities will properly maintain and review an on-site rainfall measurement device is overly optimistic – monitoring should be conducted when discharges are occurring based on government rainfall devices. The State Board needs to expand the list of monitored parameters to address all of the pollutants likely to be discharged from some facilities, including boatyards and landfills. No reductions in storm water sampling frequency should be included in the Permit. The Permit should not allow monitoring from separate drainages at a facility to be combined. And sampling should not be limited to "scheduled facility operating hours."

- CCKA agrees that the State Board should eliminate the group monitoring provisions.

- CCKA agrees with the proposed storm event design for No Discharge Certification, but the no discharge exclusion should be verified through appropriate photographic and visual monitoring in addition to certification.

- The State Board should clarify that the 90-day public comment period for new coverage notices does not alter the federal prerequisite for a citizen to bring an enforcement action under the CWA.

- Facilities should be required to submit revised storm water pollution prevention plans ("SWPPPs") to SMARTS, and all documents submitted to the State Board's Storm Water Multi-Application and Report Tracking System ("SMARTS") must be accessible via SMARTs to the public.

CCKA looks forward to a new draft permit later this year that maintains the improvements to the current permit proposed by staff and includes changes consistent with the comments below that will better assure steady progress toward eliminating the pervasive threat

currently posed to the State's waters by inadequately controlled industrial storm water discharges.

A. The State Board is Justified in Establishing Numeric BAT/BCT Effluent Limitations Based on Limits Equivalent To EPA's Published Benchmark Values.

Staff proposes to establish numeric BAT effluent limitations for any dischargers under the permit who cannot achieve compliance with specified numeric effluent limitations based on EPA's benchmark values originally published by that agency in 1995. Fact Sheet, p. 8;[2] *Id.*, p. 29; Draft Permit, § V.D (p. 15). The proposed permit would allow all dischargers up to three years and, in many cases, longer to achieve the proposed numeric effluent limitations. Fact Sheet, pp. 29-33; Draft Permit, § VII.B-C (pp. 38-41). Indeed, if a discharger achieves the limits within two years, they would never be subject to the effluent limits. *Id.*

Although CCKA believes that the compliance schedule proposed by staff is unnecessary and the concept of allowing a discharger's compliance efforts to determine the length of the schedule is unprecedented under the CWA, CCKA strongly concurs that numeric effluent limitations are entirely appropriate and indeed mandated under Sections 301, 304 and 402(p) of the CWA, 33 U.S.C. §§ 1311, 1314, 1342(p). Although staff frankly acknowledges that they have not yet completed drafting their BAT/BCT analysis, CCKA's independent analysis indicates that staff will have little difficulty considering the CWA's listed BAT and BCT factors and determining that the best performing industrial storm water dischargers around the State can reasonably achieve the numeric effluent limitations proposed by staff.

1. The Best Available Technology Standard.

By March 31, 1989, the CWA required all point source dischargers, including those discharging polluted storm water, to achieve effluent limitations based upon BAT for toxic and nonconventional pollutants and BCT for "conventional" pollutants. 33 U.S.C. § 1311(b); 40 C.F.R. §§ 125.3(a)(2)(ii), 125.3(a)(2)(iii), 125.3(a)(2)(iii). Conventional pollutants are TSS, oil and grease ("O&G"), pH, biochemical oxygen demand ("BOD"), and fecal coliform. 40 C.F.R. § 401.16. All other pollutants are either toxic or nonconventional. *Id.*; 40 C.F.R. § 401.15. These are the minimum levels of pollution control required by the Act. 40 C.F.R. § 125.3(a). In 1987, when Congress amended the Act to address EPA's failure to properly regulate storm water discharges in the previous fifteen years, Congress did not alter any of these deadlines for any "discharge associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). To the extent industrial dischargers in California have not implemented BAT or BCT, they are now 22 years overdue. *See American Frozen Food Institute v. Train*, 539 F.2d 107, 120 (D.C. Cir. 1976)

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[2] As the Fact Sheet explains: "the [numeric action levels] NAL(s) which trigger this corrective action level becomes a technology-based numeric effluent limitation (NEL). This is due to the fact that each NAL in this General Permit reflects the technology needed to reduce the pollutant to either BAT or BCT, respectively. It is the best professional judgment (BPJ) of the State Water Board staff that dischargers employing BAT and BCT can reduce the pollutants in their storm water effluent to achieve concentrations at or below the NALs." Fact Sheet, p. 8.

(BAT intended to be "levels of control which approach and achieve the elimination of the discharge of pollutants").

The State Board may establish BAT and BCT for a category of industrial stormwater discharges on a case-by-case basis. 40 C.F.R. § 125.3(c)(2). The Act sets forth the specific criteria that the State Board must take into account when establishing BAT/BCT effluent limitations. 33 U.S.C. § 1314(b)(2)(B). This is the process proposed by staff.

As for BAT, "[f]actors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." *Id. See also* 40 C.F.R. § 153.2(c)(3). Unlike the lesser standard of best practicable control technology established for the early years of implementation of the Clean Water Act, a BAT-based effluent limitation does not take into account any cost/benefit analysis. *See American Paper Institute v. Train*, 543 F.2d 328, 346 (D.C. Cir. 1976). Indeed, Congress fully expected that, for any given category of dischargers, application of BAT would result in the closure of some facilities. "Congress clearly contemplated that cleaning up the nation's waters might necessitate the closing of some marginal plants." *American Iron & Steel Institute v. EPA*, 526 F.2d 1027, 1051-1052 (3d Cir. 1975). Although the State Board must consider costs associated with its proposed BAT limitations, "some amount of economic disruption was contemplated as a necessary price to pay in the effort to clean up the nation's waters" and the State Board has "considerable discretion in weighing costs." *Id.*

Nor is the average performer within a category of dischargers representative of BAT. "[R]ather than establishing the range of levels in reference to the average of the best performers in an industrial category, the range should, ***at a minimum***, be established with reference to the ***best performer*** in any industrial category." *American Paper Institute*, 543 F.2d at 346 (emphasis added). *See also American Meat Institute v. EPA*, 526 F.2d 442, 462-463 (7th Cir. 1975); *American Frozen Food Institute*, 539 F.2d at 120-21. Thus, even for a nation-wide BAT effluent limitation established by EPA, data from as little as three facilities employing an, at the time, state of the art, "experimental" technology, was sufficient for EPA to make an achievability finding for the entire industrial category (in that instance pulp mills). 543 F.3d at 348 ("[t]he industry has been experimenting with this technique in a number of locations on a pilot-plant scale. We [the D.C. Circuit Court of Appeal] would agree that based on the very limited testing that we have seen, that this level of percentage reduction is achievable[,]" upholding EPA's BAT limitation based on such data). Anticipated application of technologies resulting from public and private research is a proper basis for establishing a BAT limitation. *See American Meat Institute*, 526 F.2d at 462-463 ("the 1983 effluent limitations are to be based on 'a broader range of technological alternatives,' including techniques 'which exist in operation ***or which can be applied as a result of public and private research efforts***'") (quoting Leg. Hist. at 170); *American Iron & Steel Institute*, 526 F.2d at 1061 ("reliance on pilot plant technology" was "proper in establishing [BAT] limitations for existing sources"). The State Board's determination of BAT-based effluent limitations "must be upheld if it can show the existence of

some technology which, if implemented, ***may reasonably be expected*** to achieve the [BAT] standards." *American Meat Institute*, 526 F.2d at 462-463 (emphasis added).

The inclusion of the term "economically achievable" also does not mean that the agency must evaluate the impacts of a state-wide BAT effluent limitation on every single industrial stormwater discharger. Rather, "the reasonableness of what is 'economically achievable' should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology - without regard to cost." *American Frozen Food*, 539 F.2d at 120-21.

Congress' "intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible." *American Frozen Food*, 539 F.2d at 120 (citing Congressional Research Service, a Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print 1973) ("Leg. Hist."), pp. 171-72). As the legislative history emphasizes, "similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." *Id.* Leg. Hist. at 171-72 (emphasis added). Where, as here, the permitting vehicle is the reissuance of a statewide general permit for all industrial storm water dischargers, the State Board already has determined that industrial storm water point sources throughout the State:

> (A) Involve the same or substantially similar types of operations;
> (B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;
> (C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal; [and]
> (D) Require the same or similar monitoring; and (E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

40 C.F.R. § 122.28(a)(2)(i). Because all industrial storm water discharges share similar characteristics, the same BAT effluent limitations should apply to each of them. Staff's proposed NELs are consistent with this requirement.

2. <u>The Best Conventional Technology Standard</u>.

Some of the basic parameters discharged by industrial storm water discharges are subject to the Act's BCT standard. These parameters include TSS, O&G, pH – long-regulated by the industrial storm water permit – as well as BOD and fecal coliform. 40 C.F.R. § 401.16. The factors that must be considered by the State Board when adopting a BCT-based effluent limitation include:

> consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of

> reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

33 U.S.C. § 1314. *See also* 40 C.F.R. § 153.2(c)(2). The State Board must determine that the proposed BCT limitations "will directly - not just incidentally - reduce [the relevant pollutant] and do so better than any other pollutant control technology." *Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486, 519 (2d Cir. 2005).

Where, as is frequently the case with TSS and pH in storm water discharges, the conventional pollutant is an indicator of the presence of toxic pollutants, the State Board "may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT). . . ." 40 C.F.R. § 125.3(h)(1). Three criteria would have to apply:

> (A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;
> (B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and
> (C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (h)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

40 C.F.R. § 125.3(h)(1). Thus, for those SIC categories where heavy metals may be present in their storm water discharges and a substantial percentage of those metals likely are bound up with sediment, even in the absence of metals data, the State Board may establish BAT limit for TSS based on the available TSS monitoring data. Although the State Board "may not set a more stringent limit [BCT limitation] if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly," as is discussed below, the same technologies apply to control TSS as well as metals levels in storm water discharged from industrial facilities. 40 C.F.R. § 125.3(h)(3).

3. <u>The State Board Must Issue Numeric BAT or BCT Limitations Unless Such Limitations are Infeasible.</u>

The State Board must issue numeric BAT/BCT effluent limitations – such as the NELs proposed by staff -- unless it can make specific determinations set forth in the federal regulations allowing for non-numeric limitations. Although usually required as supplements to other

NPDES permit conditions, EPA's regulations do provide for effluent limitations to be established as best management practices ("BMPs") requirements only when "[n]umeric effluent limitations are infeasible. . . ." 40 C.F.R. § 122.44(k)(3). Any determination by the State Board that numeric limitations are infeasible must be supported by the weight of the evidence. As proposed, the draft permit includes an initial approximately three-year (possibly longer) BMP phase supported by Numeric Action Levels ("NALs"). For those facilities who do not implement sufficient BMPs to achieve the NALs after the initial BMP phase, the permit's proposed NELs become applicable.

4. Ample Monitoring Data Exists on which the State Board Can Rely in Assessing the Statutory Criteria for Establishing BAT and BCT-Based Numeric Effluent Limitations.

One of the main complaints aired by the dischargers is that the State Board should not rely upon EPA's benchmark values as BAT effluent limitations. *See* CASQA Draft Industrial Permit Hearing Testimony, p. 15 (March 29, 2011) (slide presentation). In fact, an incredible amount of effluent monitoring data has been gathered in support of these figures over the last 19 years, and EPA itself draws a direct link between the multi-sector permit's benchmark values and implementation of BAT and BCT:

> The benchmark values are concentrations which are used to evaluate whether a generally effective SWPPP is being implemented. The SWPPP is required to ensure compliance with the technology-based discharge requirements of the Clean Water Act.

65 FR 64746, 64781 (Oct. 30, 2000). In publishing the benchmarks, "EPA . . . sought to develop values which can realistically be measured and achieved by industrial facilities." 60 FR 50804, 50825 (Sept. 29, 1995). For each of the benchmark values, EPA determined that they were "reasonably achievable." *See id.* ("EPA believes this level … is reasonably achievable by industrial storm water dischargers"). Likewise, federal courts have acknowledged the utility of using EPA's benchmarks in evaluating a facility's compliance with the existing permit's BAT/BCT standard. *Baykeeper v. Kramer Metals, Inc.*, 619 F. Supp. 2d 914, 924 (C.D. Cal. 2009) ("[t]here can be no reasonable dispute that the Benchmarks are relevant to the inquiry as to whether a facility implemented BMPs"); *Waterkeepers Northern California v. AG Industrial Mfg. Inc.*, 375 F.3d 913, 919 n.5 (9th Cir. 2004) (suggesting that the plaintiff appropriately pointed to EPA Benchmark values "as evidence to support its claim that [the defendant] failed to implement adequate BMPs").

Although EPA did not choose in its multi-sector permit to adopt numeric BAT or BCT effluent limitations, given the large amount of data available to the State Board, there is nothing precluding the State Board from completing the necessary BAT analysis (as staff indicates is already being prepared) and concluding that the best industrial storm water treatment performers in the State may reasonably achieve staff's proposed BAT effluent limitations based on EPA's benchmark values.

Since the State Board first issued the General Permit in 1992, tens of thousands of samples have been taken and the resulting analytical data provided to the Regional and State Boards. As representatives of CASQA have underscored at the workshops held by the State Board on the draft permit, the tens of thousands of data points available to the Board and the public can be evaluated to determine the achievability of a range of possible technology-based limitations. CASQA's analysis shows that greater than 40 percent of the samples taken by dischargers already are achieving all of the effluent limitations proposed in the draft permit. CASQA Testimony, p. 28. More than 80 percent of the samples are complying with the proposed lead limitation. *Id.* Although CASQA's analysis does not indicate what levels of technology have been employed by each reporting facility, the fact that, without regard to specific technologies, a significant number of all facilities under the current permit are achieving the proposed numeric effluent limitations indicates that the "best performers" in the category of industrial storm water discharges can reasonably achieve the benchmark-based limitations proposed in the draft permit.

With the exception perhaps of a few consultants working on storm water control issues, CCKA's member organizations as well as CSPA have perhaps the most experience of any third-party groups reviewing storm water annual reports and conducting site inspections of facilities subject to the current general permit. Together, the organizations represented by this comment have reviewed thousands of facility annual reports. For example, since January, 2005, CSPA's investigators alone have reviewed over 850 industrial facility files in the Central Valley, San Francisco Bay, North Coast and Los Angeles Regions. In its review of those files, the investigators systematically compare reported monitoring results with EPA's benchmark values. Of those approximately 850 reviewed files, monitoring reports for about half of the facilities indicated general compliance with the benchmark values. Of the approximately 50 percent that did not achieve the benchmark values, a small percentage, roughly 30 percent, indicated consistent or substantial exceedances. These are the files for which CSPA would conduct further investigation and possibly prepare notices of intent to sue under the CWA. Since January 2005, approximately 150 facilities have fallen into this category. Invariably, for these facilities, the investigators determined that the storm water control measures employed at the facilities were either nonexistent, inadequate, or did not address the entire facility. Based on the available information, none of the facilities in this category employed available media filtration systems on discharges of concern. As discussed below, once these facilities employed the best available treatment technology, whether in the form of a properly designed and sized media filtration system along with vigorous housekeeping, coverage, and inlet protection, they either met, or had a reasonable expectation of meeting the benchmark values.

The dischargers' presentations at the State Board's workshops demonstrate several fundamental misconceptions about the CWA's requirements for adopting BAT/BCT effluent limitations. Rather than the State Board seeking out examples of the best performing facilities, the various discharger associations appear to argue that the State Board has to rely on the performance of every single industrial storm water discharger – even the worst performers. For example, CASQA criticizes staff's proposed effluent limitations because, based on data over the life of the general permit, over 40 percent of facilities' monitoring results did not meet the proposed numbers for copper and zinc and less than 20 percent of the monitoring results did not

meet the proposed lead number. Fundamentally, CASQA appears to be arguing that all performers' efforts to date – even those facilities who have made only the bare minimum of effort to comply with the permit – must be able to meet any BAT/BCT limitation adopted by the State Board. This, of course, is not the standard. BAT and BCT both focus on best performers and a reasonable expectation that facilities employing the same technologies and techniques observed at the best performing facilities also will achieve the limitations. The draft permit's proposed NELs are entirely consistent with that mandated BAT/BCT focus. A proper BAT limitation looks forward to what the industrial facilities can achieve. It does not set a bar based on poor performing facilities or even the average facility.

Based on CCKA's and CSPA's review of thousands of facility files, the reason facilities are not already achieving discharge levels lower than the benchmarks is because they have not implemented available management practices, prevented storm water from falling on polluted areas of their facilities and/or installed effective pollution treatment systems at their outfall(s). Invariably, the groups' investigations of poorly performing facilities show that the sites are not well-maintained, or are visibly dirty usually with extensive cracking of their ground covering. Invariably, these facilities will be clinging to the fiction that a piece of cloth filter or, more recently, the installation of a Triton-type filter, that buckles in large rain events and is capable of removing only a small percentage of storm water pollution, somehow qualify as BAT or BCT. They do not. The monitoring data cited by CASQA as demonstrating that facilities are not currently meeting staff's proposed limitations likely are, in large part, monitoring results from facilities employing these less than BAT or BCT levels of pollution control.[3]

5. Numeric Effluent Limitations are Plainly Feasible.

There can be no reasonable dispute that numeric effluent limitations are feasible. As a result, the State Board may no longer rely upon an industrial stormwater permit that relies exclusively on BMPs. See 40 C.F.R. §§ 122.44(k)(3). As the technical panel convened by the State Board in 2006 found, "[t]he Panel believes that Numeric Limits are feasible for some industrial categories. Industries have control over their facilities. They control access, construction practices, product substitution to affect pollution prevention and the types of treatment systems to be used to mitigate stormwater runoff." Storm Water Panel Recommendations to the California State Water Resources Control Board, "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities," p. 19 (June 19, 2006). "There are many treatment systems or prevention practices that have been in place for lengthy periods, extending back to the 1980s in many cases." *Id.* The panel did not indicate what it meant by "some industrial categories." Based on CCKA's experience walking through and reviewing hundreds of facilities' storm water measures, there is no discernable difference in the range of storm water treatment options available to all of the industrial facilities currently covered by the General Permit. Although the scale and necessary mix of management practices, coverage options and

[3] CASQA's review of the data also includes monitoring from the initial years of the program, results which on average would be higher than pollution levels currently being achieved under the permit.

treatment obviously is different from facility to facility, the range of options, techniques and equipment is essentially the same for all facilities. All facilities can usually cover substantial portions of their operations. All facilities can contain and treat storm water if necessary, at least up to a specified design storm (for example, 25-year, 24-hour). All facilities can select from a wide range of housekeeping practices. Numeric limitations are feasible for all industrial storm water dischargers.

The panel, however, approaching the questions presented from an engineering perspective, articulates effluent-setting options that are inconsistent with the CWA. For example, for the industrial storm water dischargers, the Panel suggests keying any numeric limits into the TMDL program. *See* Panel Report, p. 19. This is not a legal option under the CWA. The NELs proposed by staff are BAT and BCT limitations, not water quality-based effluent limitations. Any TMDL-based approach, by definition, is not a BAT or BCT limitation. The draft Fact Sheet also is careless about the two different types of effluent limitations (and should be cleaned up in this regard). In those watersheds where industrial facilities are discharging polluted stormwater contributing to identified impairments, the permit must require even more stringent limitations that go beyond and are not limited to the implementation of BAT or BCT. The Panel's concept that, in order to adopt numeric BAT and BCT effluent limitations, the State Board should focus on a subset of impaired waterbodies and must engage in the more complicated and costly development or implementation of waste load allocations, is not consistent with adopting BAT and BCT limitations under the CWA.

The panel's second option for establishing numeric effluent limitations would appear to better track the CWA's BAT and BCT criteria but still errs in several substantive ways and ultimately places too much weight on the average performers rather than the best performers. For example, the Panel places great store in the need for a reliable database assessing BMPs employed by all of the dischargers. The task suggested by the panel is not necessary for the State Board to adopt appropriate BAT and BCT limitations. As the court of appeal rulings described above make clear, the State Board need only review the best performers in the industrial storm water discharge category. Moreover, the Board's adoption of BAT or BCT limitations is not constrained by current permitted facility's resistance to installing media filtration systems and other more costly treatment options. Even technologies that have only been pilot tested and are not yet installed by facilities whose discharges would benefit from their installation, can and should be the basis for appropriate BAT and BCT limitations.

Applying the CWA's BAT and BCT factors correctly does not require the State Board to redo the 19 years of data collected by industrial facilities to date. The factors require the Board to only review the best performers and the best available technologies, even if those technologies are not widely implemented as yet. The BAT/BCT analysis being prepared by staff should clarify that this is what staff has done in proposing the NELs.

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6. A Technical Review of Media Treatment Systems Currently Used by the Best Performers and Adjustable to All Industrial Storm Water Facilities Shows That Compliance with Staff's Proposed NELs Is Feasible and Reasonably Expected to Be Achieved.

Staff states that "[i]t is the best professional judgment (BPJ) of the State Water Board staff that dischargers employing BAT and BCT can reduce the pollutants in their storm water effluent to achieve concentrations at or below the NALs." Fact Sheet, p. 8. CCKA has retained Matt Hagemann of SWAPE,to review existing effluent data from advanced treatment systems in place at facilities throughout California, as well as in Oregon and Washington. Mr. Hagemann's review corroborates staff's best professional judgment that the best performers in the industrial storm water discharger category can reasonably be expected to achieve numeric BAT effluent limitations consistent with the proposed NELs. *See* M. Hagemann, SWAPE, "Comments on the Draft California NPDES Industrial General Permit (April 28, 2011) (enclosed with these comments and incorporated by reference).

Mr. Hagemann obtained and reviewed data from a leading technology provider, StormwateRx, who manufactures and installs stormwater treatment systems.[4] Hagemann, p. 2. The data set included all of the data obtained by the company from all facilities where the StormwateRx systems have been installed in California, Oregon and Washington. *Id.* The types of facilities where the equipment has been utilized involve some of the most polluting sectors included in the general permit, including boatyards, scrap yards (ferrous and non-ferrous), galvanizing facilities, plastic fabrication, a power plant, shipyard and trucking facilities. All the data was real world data – not data from pilot projects. *Id.*

As Mr. Hagemann explains, the complete StormwateRx treatment train includes an oil-water separator (Clara), a media filtration step (Aquip) and a polishing stage (Purus). *See* http://www.stormwaterx.com. Hagemann, p. 2. Reviewing the data collected from facilities employing some or all of those components, Mr. Hagemann concludes that, even when applied to some of the most challenging storm water pollution sources, the best performing facilities can reasonably comply with the proposed NELs. Some of the tested facilities can comply with the proposed NELs with only one or two of the StormwateRx components. *Id.*, p. 4. Mr. Hagemann's review indicates that all of these more problematic pollution sources would be able to comply with staff's proposed NELs with the implementation of the full StormwateRx treatment train as well as aggressive housekeeping and BMPs upstream of the treatment systems. *Id.* Mr. Hagemann emphasizes that, because the data is limited to the most difficult storm water pollution sources, the best performing facilities from outside the scrap yards, galvanizers and other more challenging facilities would reasonably achieve compliance with the proposed NELs without treatment or fewer treatment components. *Id.* Mr. Hagemann concludes:

> The data presented in Attachment 1 show that NELs were achieved at those sites where the full treatment train (the Clara, Aquip, and Purus) was implemented . . . .

[4] Other comparable treatment systems are manufactured by Storminator. *See* http://swonline.org.

> With implementation of a full treatment train or where the polishing stage (Purus) is installed, we believe the StormwateRx data show that achieving NELs is feasible for the full range of industrial facilities covered under the proposed Industrial General Permit.

Hagemann, p. 4. Mr. Hagemann also makes clear that the facilities which have, thus far, installed treatment systems like the Clara, Aquip and Purus are worst case storm water pollution sources. As he notes,

> We have concluded that achieving the NELs is feasible for not only the most contaminated sites but also for the vast majority of sites where influent concentrations are not as high as for those for which StormwateRx data were submitted. Implementation of one or two components of the full StormwateRx system (or of a similar system) would allow for facilities covered under the Industrial General Permit to achieve NELs. Where influent concentrations are particularly high, the full StormwateRx treatment train may be necessary to achieve NELs. At other sites, where concentrations of metals are lower, use of velocity separation devices, inlet filters and vegetated swales, along with aggressive source control BMPs, would allow for NEL concentrations to be achieved.

Hagemann, p. 5. "We believe the proposed NELs can be reliably achieved using available best management practices and treatment technology and concur with State Water Board staff who state (Fact Sheet, p. 8)...[i]t is the best professional judgment (BPJ) of the State Water Board staff that dischargers employing BAT ... and BCT ... can reduce the pollutants in their storm water effluent to achieve concentrations at or below the NALs." *Id.* Finally, if averaging of samples is allowed for specific individual outfalls, that too will make it even more reasonable to expect compliance with proposed NELs. Hagemann, p. 5. Mr. Hagemann's review and comments provide staff useful evidence to apply as they complete their BAT/BCT analysis for the proposed NELs.

7. <u>The TSS Limitation to Be Included in the Permit Also Must Reflect the Best Performers.</u>

A large number of industrial storm water dischargers currently do not monitor for metals or other pollutants. For those facilities that do not monitor for additional parameters, the TSS limitation must be established based on BAT as well. It is well-understood that some metals readily bind to sediments. *See, e.g.* Norberg, Gunnar, "Handbook on the Toxicology of Metals" (3d. ed. Academic Press 2007), p. 256. As a result, effectively controlling TSS levels may serve to control and reduce heavy metals in a discharge as well. Based on CCKA's review of discharger reports, every discharger can achieve an effluent limitation of 100 mg/L. The best media treatment systems available consistently reduce TSS in storm water discharges to 50 mg/L or less.

In addition, the permit should establish a turbidity limitation as well, complimenting the turbidity standards in place in every regional board's basin plan. Comments prepared on behalf of Lozeau Drury LLP and the Northern California Carpenter Regional Council for the construction storm water general permit demonstrate that a turbidity limitation of 50 NTU is readily achievable effectively employing existing best management practices. *See* Carpenter Environmental Associates, Inc., "Comments on State Water Resources Control Board National Pollution Discharge Elimination System, Draft General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (June 10, 2008). That limitation should be added to the permit.

8. CCKA Agrees That a Daily Average May Be Applied to Measure Compliance With Numeric BAT/BCT Effluent Limitations.

Staff proposes generally to allow dischargers to apply daily averages. *See* Fact Sheet, p. 30. CCKA agrees that, to the extent a discharger takes more than one sample of a specific storm discharge on any given day, the facility may average the total samples for that day. However, as detailed below in Section G.7, CCKA does not agree that dischargers should be allowed to average their analytical results from different drainages within a facility.

B. The Proposed Provisions to Determine Whether a Facility is Causing or Contributing to an Exceedance of a Water Quality Standard Complicates the Assessment of Standards at Specific Facilities.

Staff proposes to continue to rely on a narrative standard to require industrial storm water dischargers to comply with applicable water quality standards. See Draft Permit, Section VI.A. With the exception of hardness monitoring, no specific monitoring is identified in the permit or Fact Sheet as applicable to implementing the permit's receiving water limitations. The Fact Sheet and permit do describe a process for following up on violations of the permit's receiving water limitations. Fact Sheet, p. 9. *See* Permit, ¶ VII.E.2. As described, a discharger would have to undertake facility improvements when it is notified by a regional board or when the facility "determines that the discharge is causing or contributing to an exceedance of water quality standards. . . ." *Id.* This cumbersome process does not alter the permit's receiving water limitations. *See, e.g. Baykeeper v. Kramer Metals, Inc.*, 619 F.Supp.2d at 927. It does however complicate and confuse the appropriate reaction of a violating facility.

1. The State Board Should Clarify that Compliance Monitoring Must Occur at the Point Where Discharges Leave the Facility.

Rather than avoiding mention of monitoring and the response outlined in the permit, the permit should instead clarify that the receiving water limitation must be measured where storm water discharges leave the facility, either at a drop inlet or outfall, *i.e.*, the same current monitoring locations included in the existing permit. This is the only appropriate monitoring location because the facilities storm water discharges cannot take credit for any mixing or dilution that may result once its storm water combines with upstream storm water in a municipal system or in a receiving water.

The federal courts that have considered these issues have uniformly applied applicable water quality standards at the point where storm water leaves the facilities. *See Santa Monica Baykeeper v. Sunlite Salvage, Inc.*, Case No. 99-04578 WDK (slip op. Dec. 12, 1999); *Baykeeper v. Kramer Metals, Inc.*, 619 F.Supp.2d at 927 (finding facility liable for discharging stormwater in violation of receiving water limitation based on samples taken at facility's discharge to municipal storm drain system); *Waterkeepers N. Cal. v. AG Indus. Mfg.*, 2005 U.S. Dist. LEXIS 43006, 24-25 (E.D. Cal. Aug. 19, 2005) (compliance with general permit, including water quality standard requirement, must be measured at location where storm water exits the facility because no dilution credit or mixing zone authorized). Staff should align the permit's requirements for monitoring the water quality-based effluent limit with the courts' rulings.

The proposed permit does make reference to the need for dischargers to analyze for hardness in order to properly compare their storm water's pollution levels of six hardness dependent metals (Cadmium, Copper, Lead, Nickel, Silver, and Zinc) to water quality standards. *See* Draft Permit, ¶ XIV. However, staff's proposed method for addressing hardness is arbitrary and errs as a matter of law. First, staff applies the hardness measurements to its proposed BAT effluent limitations. Hardness only applies to the permit's receiving water limitations which prohibit facilities from causing or contributing to any exceedance of hardness dependent metal standards. The BAT effluent limitations are technology-based and the anticipated performance is not dependent on hardness.

Second, staff proposes to have facilities measure hardness in downstream receiving waters or to compile existing hardness data for those waters. Although ideally the hardness of ambient receiving waters unaffected by permitted discharges should be the basis for a water quality-based effluent limitation for the six metals, this additional monitoring burden is not warranted ***if*** monitoring is conducted at the point where the stormwater leaves the facility. In the case of storm water discharges that are not subject to any dilution credits or mixing zones, the State Board may and should provide for measuring hardness of the discharges at the facility. CCKA believes the hardness value at the point where stormwater leaves the facility is more consistent with the absence of a mixing zone or dilution credit. In the context of storm water, the receiving water's hardness presumably is greatly affected by the storm water discharges that would be occurring when samples are taken. Relying on dry weather hardness numbers in the receiving water likely would be no more representative than hardness numbers derived from the facility's storm water effluent. Lastly, as a practical matter, it may turn out that the hardness values in a facility's storm water are generally higher than the hardness of receiving waters on non-rain days. In that event, CCKA's proposed hardness measurements would result in a slightly higher receiving water limit for the six metals and help to facilitate permit compliance by the facilities measuring these pollutants.

2. <u>The Permit Should Require Analysis of the Dissolved Fraction of Metals Present in Discharges</u>.

Although staff at least addresses the benefit of hardness measurements when implementing water quality standards, staff does not provide for facilities to analyze for the

dissolved fraction of metals in their stormwater discharges. The California Toxics Rule as well as a number of Basin Plans establish numeric water quality standards based on levels of dissolved metals. *See, e.g.* 65 Fed. Reg. 31682, 31712 & 31716 n. m (May 18, 2000). CCKA recommends that the permit require facilities discharging metals to analyze for the dissolved fraction of metals present in their discharge. This measurement would allow a more direct comparison of the facility's effluent to the existing water quality standards. It also again would facilitate compliance with the permit limitation by removing the non-dissolved fraction of metals from the comparison, effectively lowering the facility's reported pollution level applicable to the receiving water limitation for metals.

C. The Proposed Corrective Action Levels Improperly Delay Implementation of BAT/BCT.

CCKA has a number of serious concerns regarding the proposed three-year corrective action procedures. Staff proposes to defer the effectiveness of the proposed numeric effluent limitations for three years or more. Fact Sheet, pp. 29-33. Staff proposes that in the interim, the proposed numbers be treated as numeric action levels. *Id.*, p. 29. Staff then provides for a procedure where, if a facility exceeds the action levels by specified amounts, corrective actions are required and, as of the third exceedance, numeric effluent limitations are triggered. *Id.* ***CCKA believes the first two levels of corrective action should have been completed many years ago by all dischargers and, given the express deadlines for achieving BAT and BCT in the CWA as well as the 19 years that have passed since the State's adoption of the original general permit, the State Board cannot justify any compliance schedule.*** BAT and BCT already are mandated by the current permit, and the new permit should continue to require BAT and BCT immediately upon adoption. As discussed above, facilities implementing true BAT and BCT already are achieving the pollution levels that comply with the proposed NELs. There is no legitimate policy reason to coddle dischargers who have failed to implement BAT and BCT 19 years after the requirement was adopted in a permit.

1. Level 1 Operational Source Control Should Already Have Been Accomplished and Cannot Reasonably Be Described as "Over and Above" Minimum BMPs.

Dischargers who have not already accomplished the actions listed out in the proposed Level 1 corrective actions are in blatant violation of the existing permit. Staff's proposed Level 1 lists out the most basic measures that a facility has to have in place – actions that alone likely will fall well short of BAT or BCT. "Level 1 corrective action emphasizes operational source control BMPs such as better good housekeeping practices, minimizing pollutant exposure, better training, etc." Fact Sheet, p. 30. *See* Draft Permit, ¶ VII.B. Any discharger who already has monitored pollution levels at their facility in excess of EPA benchmarks who has not already done this is in blatant violation of the general permit. This level will not improve anything on the ground. It simply rewards existing violators with a year's grace period from the proposed effluent limitations.

2. At a Minimum, Level 2 Structural and/or Treatment Controls Already Should Be Implemented by All Industrial Facilities to Achieve BAT/BCT.

The same is true for Level 2. "Level 2 corrective actions require the consideration of structural source control BMPs (additional overhead coverage, containment of certain areas, etc) and treatment BMPs." Fact Sheet, p. 30. *See* Draft Permit, ¶ VII.C. Under the existing permit, the basic structural review proposed by staff had to be part of any facility's consideration of its compliance with the BAT/BCT requirement.

3. Numeric Effluent Limitations Must Be Established Now, without the Proposed Three-Year Compliance Schedule.

There is no authority in the CWA for the State Board to adopt a schedule of compliance to achieve a technology-based effluent limitation. Effluent limitations achieving BAT and BCT were required to be implemented not later than March 31, 1989. 33 U.S.C. § 1311(b). Hence, the State Board has no authority to extend that firm compliance deadline established by Congress. Schedules to achieve water quality-based effluent limitations are extremely limited as well this late in the CWA's implementation. *See* State Board Resolution No. 2008-0025, "Policy For Compliance Schedules In National Pollutant Discharge Elimination System Permits." The State Board may not adopt a permit that is less stringent than the requirements of the CWA. 33 U.S.C. § 1370.

4. The Proposal to Condition the Application of the NELs to a Specific Facility Based on the Facility First Exceeding the NALs is Inconsistent With the Definition of Compliance Schedules and the State Board's Duty to Establish BAT and BCT Limits.

The long-passed deadline for implementing BAT and BCT effluent limitations also precludes the Board from making the applicability of the NELs contingent on exceedances of NALs. Staff proposes an essentially open-ended compliance schedule for facilities that already are achieving the proposed NELs. CCKA is unaware of any permits allowing a facility to control the applicability of effluent limitations to its facility. The proposal, of course, makes little sense where compliance schedules are only necessary where a facility needs time to come into compliance. *See* 40 C.F.R. § 122.47(a)(1). In addition, because these facilities are achieving the NELs, there is no question of about the reasonableness of their complying with the NELs. Making the NELs applicable to all dischargers, including those already in compliance, would assure those complying facilities remain in compliance and assure that the possible repercussions of noncompliance are borne equally by all of the industrial storm water dischargers.

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5. Even Assuming There Is a Logical Place for Corrective Action Levels in the Permit, the Proposed Scheme's Loopholes Should Be Closed.

Assuming there is a valid reason for the State Board to include some version of the proposed corrective action levels, the timing of each level and the prevalence of numerous loop holes must be clarified or eliminated.

a. *As written, the corrective action levels may allow more than one year for a discharger to stay at the lower action levels.*

Language in the permit would appear to allow a discharger to prolong their stay in the lower corrective action levels, even without complying with the action level limitations.

For proposed Level 1, the permit allows the discharger to select additional housekeeping and control measures on their own initially, and they must implement those additional measures by October 1 prior to the following rainy season. The proposal calls for review by Regional Board staff and the possibility that the Regional Board will require additional measures beyond those identified by the discharger. The proposed timelines give the Regional Board 30 days from the submission of the corrective action level report, which is due on July 15th of each year, to provide for additional measures. The discharger then has "90 days after receiving comments from the Regional Water Board **or October 1 of the next reporting period** (whichever is later)." Draft Permit, ¶ VII.B.6 (emphasis added). Adding up 30 days, plus 90 days as well as a few days for the comment to arrive, puts the deadline for implementing the additional regional board actions in late November. Because that date is after October 1, any such additional measurers will not be implemented until the next rainy season. This language would create significant confusion and delay about when the corrective action level actually must completed.

Proposed Level 2 would allow the Regional Board to extend the October 1 deadline for constructing additional BMPs. CCKA does not see any reason to extend the permit deadline beyond October 1. Dischargers at this level would have been well aware of their exceedance of the action levels for almost two years. Even the second triggering events would have happened some time during the rainy season. The facility should then be planning on additional measures in order to prepare the required "exceedance evaluation report" by July 15. There is no reason that the facility cannot plan, purchase and schedule implementation or construction of these basic, and widely available, additional measures by October 1. If a facility has made a good faith effort to comply and nevertheless misses the deadline, the Regional Board can take that into account when exercising its enforcement authority, rather than have to expend scarce staff resources reviewing and responding to the wave of extension requests encouraged by this provision.

b. *The Permit should not allow an exception for an industrial facilities' NAL exceedance based on claim that exceedances are not related to industrial activities.*

The proposed Level 1 corrective actions include what amounts to an exception from the

permit for "non-industrial" activities associated with an otherwise permitted facility. The exception assumes that the non-industrial activities are actually polluting at levels above the NALs/NELs. Draft Permit, ¶ 7.B.2.c (where NAL exceeded, discharger can certify that the cause of the exceedance is "not related to the facility's industrial activities and no additional BMPs or SWPPP implementation measures are required to reduce or prevent pollutants in storm water discharges in compliance with BAT/BCT. The certification shall describe the non-industrial related source(s)"). *See* Fact Sheet, p. 31. This provision strikes CCKA as oxymoronic – by definition, if the source(s) of pollutants exceeding the limits are at an industrial facility, then they must be related to the industrial facility. CCKA has a difficult time imagining an example of non-industrial-related pollution that is completely unlinked to operations at the facility. For example, discharges from corrugated metal roofs high in zinc surely are related to the industrial activity of the facility, the roof forming an integral part of the operation. Any vehicle parking at the facility, including employees' cars, is obviously related to the industrial activities, being necessary to make sure the workers arrive to carry out the business of the facility.

The better interpretation would be that, if any industrial activity occurs at a facility, all sources of pollution resulting in exceedances of the permit's limits must be addressed as all activities at the facility are by their very presence, associated with the industrial facility and its operations. That is EPA's position in its multi-sector permit. 65 FR 64746, 64769 (Oct. 30, 2000) (structural sources of pollution at industrial facilities not exempted from multi-sector permit's requirements). This would further the goals of the statute to prevent excessive pollution in situations where the facility plainly has control over the discharge. This would be one less burden on staff, who already lack the resources to implement the current permit. Lastly, this position is consistent wither the CWA, which requires NPDES permits for pollution discharges from all point sources, regardless of the source of the pollution. *See Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F.Supp.2d 803, 819 (N.D.Cal. 2006) (Court held that plaintiff did not need to measure pollution concentrations in run-on to prove discharge of pollutants from logging road).

c. *The permit should not allow an excuse for an industrial facilities' NAL exceedance based on run-on.*

Under Level 3, when the proposed effluent limitations become effective, the permit provides an exception where the exceedance is caused by "run-on." Draft Permit, ¶ VII.D.2 ("NELs do not apply if the industrial facility receives run-on . . ."). The current draft permit appropriately does not provide any such exception. The proposed exception is much too broad, and could indeed provide an incentive for facilities to ask their neighbors to discharge storm water to their property so that they can excuse themselves from the proposed permit's effluent limitations. Among the hundreds of facilities that the Waterkeepers and CSPA have visited over the years, only a small percentage had run-on issues. However, in each instance, the run-on of storm water from a neighbor's property was easily addressed by measures to route that storm water around the facility or otherwise prevent the run-on. That should be the express requirement of the proposed permit. In those rare instances that a facility has run-on that cannot be routed around or past the facility, then the permit should require representative monitoring of

the storm water discharges from the industrial facility where the NELs would apply. A functional and enforceable permit that actually addresses the polluted storm water associated with the industrial facility cannot simply excuse the facility's entire stormwater flow from the NELs based on the facility's failure to control run-on onto its facility.

The State Board's permit should follow the lead of EPA on this issue. The multi-sector permit makes clear that neither run-on nor atmospheric deposition (as noted in more detail below) are appropriate excuses for controlling pollution levels in an industrial facility's stormwater discharges. As EPA states:

> The fact that storm water discharge pollutant levels could be affected by atmospheric/dry deposition, run on and fate in transport, as well as structural sources, was a concern of a few commenters. EPA acknowledges the potential for adding pollutants to a facility's discharges from external or structural sources. Permittees are, nonetheless, still legally responsible for the quality of all discharges from their sites (or any runoff that comes into contact with their structures, industrial activities or materials, regardless of where these are located)-but not from pollutants that may be introduced into their discharges outside the boundaries of their properties. Pollutant levels, whether elevated from air deposition, run-on from nearby sites, or leachate from on-site structures, remain the responsibility of permittees. This was affirmed in the ruling by the Environmental Appeals Board against the General Motors Corporation CPC-Pontiac Fiero Plant in December 1997.

65 FR 64746, 64769 (Oct. 30, 2000). Certainly for run-on, EPA has correctly construed the statute.

d. *Any excuse for an industrial facilities' NAL exceedance based on atmospheric deposition from a forest fire or any other natural disaster must be limited and documented by aerial deposition monitoring.*

The permit also would exempt pollution levels of atmospheric deposition from a forest fire or other natural disaster from the proposed effluent limitations. Draft Permit, ¶ VII.D.2 ("NELs do not apply if the industrial facility receives ... atmospheric deposition from a forest fire or any other natural disaster"). The permit should clarify that the proposed exception would be limited in time to the duration and after effect of a forest fire or natural disaster and should not exempt pollutants that are not fire or disaster-related but from the facility. For example, CCKA does not believe that high levels of metals would be deposited on an industrial facility from a forest fire. Nor should allegations of elevated pollution levels from distant fires be allowed by the Board. In addition, the Board should place the burden on facilities seeking to take advantage of this exception to provide aerial monitoring data clearly documenting that the pollutants for which an exemption is claimed were from a recent forest fire. Given these numerous caveats, it likely makes more sense for the Regional Board to delete this exemption and rely instead on its enforcement discretion to address specific instances where forest fires may have affected a facility's performance.

e. *The only method available to the Regional Boards to suspend any numeric effluent limitations included in the general permit should be the issuance of an individual permit based on a facility-specific BAT/BCT and water quality-based effluent limitation determinations.*

The draft permit proposes a procedure for facilities that have triggered the effluent limitation requirement, Level 3, to request a "Suspension of Numeric Effluent Limitations" or "SNEL." Draft Permit, ¶ VII.D.5 – 8. The draft permit sets out several categories of information that the SNEL would demand, including documentation that the facility's discharge is not causing or contributing to a violation of a water quality standard, documentation that the facility has complied with Levels 1 and 2, a description and cost analysis of additional BMPs necessary to meet the effluent limitations, and certification from a registered civil engineer. *Id.*; Fact Sheet, p. 33.

In effect, what staff proposes is to amend the permit in violation of the process established in the regulations to amend the permit for specific facilities. The proposal is both illegal and another component that will swamp the regional boards with numerous, meritless requests. When a NPDES permit is modified, the Regional Board must follow the decision-making steps set forth in the Code of Federal Regulations for draft NPDES permits. *See* 40 C.F.R. § 122.62. Unless a modification qualifies as a "minor modification," in order to modify a NPDES permit, "a draft permit must be prepared and other procedures in part 124 (or procedures of an approved State program) followed." *Id.*[5] The procedures include, for example, the preparation of a draft permit (40 C.F.R. § 124.6),[6] a fact sheet (40 C.F.R. § 124.8), public notice and an opportunity for the public to comment on the proposed modification (40 C.F.R. § 124.10), and an agency response to comments (40 C.F.R. § 124.17). A permit may only be modified for one or more of the causes specifically listed at 40 C.F.R. § 122.62 ("If cause exists, the Director may modify or revoke and reissue the permit accordingly. . ."). Obviously, deleting an otherwise applicable numeric effluent limitation which the facility already has exceeded can hardly amount to good cause for an amendment. The State Board should adopt defensible numeric effluent limitations and make them applicable. The technology and measures are available for all facilities to meet the effluent limitations proposed by staff. If a specific facility believes that the stormwater falling on its facility is somehow unique from that falling on the other facilities in the state, then the facility can seek an individual NPDES permit to address those idiosyncrasies. An inducement for run-of-the-mill facilities to seek to delay implementation of the numeric effluent limitations is not consistent with the regulations and not necessary.

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[5] Minor modifications are limited to specific permit alterations not applicable to the Executive Director's action, including for example typographical errors, changes in ownership, additional monitoring or reporting or deleting terminated outfalls. 40 C.F.R. § 122.63. The removal of limitations implementing a TMDL can hardly be deemed a minor modification.

[6] "Draft permit means a document prepared under Sec. 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a 'permit.'" 40 C.F.R. § 122.2.

Given the basic requirements set forth in Levels 1 and 2, one can expect many facilities to delay the more stringent measures necessary to meet the proposed effluent limitations and a deluge of SNELs pouring into the regional boards about two years after the proposed permit is adopted. By adhering to the regulations' existing procedures for issuing individual permits, the proposed permit's inducement for facilities to file SNELs will be limited to those very few facilities so unique that perhaps individual permits may be appropriate.

f. *The Fact Sheet should clarify that the permit does not limit the proposed first trigger to exceedances in two consecutive storm events.*

The proposed permit establishes three triggering events that would move a facility from one corrective action level to another. These include:

> The Daily Average for any one constituent exceed the NAL value for two or more storm events of a reporting year, or;
> The DA for any two constituents exceed the NAL values for any single storm event within a reporting year, or;
> The concentration for any one constituent exceeds 2.5 times the NAL value for any one individual or allowable combined sample (or is more than one pH unit outside the NAL pH range)

Draft Permit, ¶ VII.E.1. However, the Fact Sheet suggests that the two NAL exceedances are for consecutive storm events. Fact Sheet, p. 30 ("Trigger 1(above): Any particular parameter exceeds the NAL twice. If sampling results (for one parameter) over two consecutive storm events demonstrate characteristics that meet trigger 1, this indicates the possibility of a larger compliance problem"). The Fact Sheet should be edited to make it clear that any two - even nonconsecutive - exceedances in a given rain year would meet this trigger event. After all, the permit only calls for four samples total. If half of the samples exceed the limits, that is significant.

D. The State Board Needs to Clarify That the Permit Is Not Limited to the Listed SIC Industrial Categories.

1. <u>The State Board Has No Authority to Exclude Any Industrial Activities from the Permitting Requirements.</u>

The State Board should clarify that, by attaching a list of specific categories of industrial facilities that are covered under the Draft Permit, the Board is not excluding any industrial activities from the permitting requirements (Attachment A). This list of specific SIC codes and categories of facilities, which mirrors the categories of facilities considered to be engaging in "industrial activity" set forth in 40 C.F.R. § 122.26(b)(14), could be read to implicitly exempt industrial activities that are not on this list. However, the State Board has no authority to make such exemptions, and in fact it must clarify that the types of facilities covered by the Permit to include all discharges which are industrial in nature. Indeed, as the Blue Ribbon Panel noted, "SIC categories are not a satisfactory way of identifying industrial activities at any given site.

The Board should develop a better method of characterizing industrial activities that can impact storm water." Fact Sheet, p.3.

CWA § 402(p)(2)(B) explicitly requires an NPDES Permit for discharges associated with industrial activity. Thus, all discharges which are *industrial in nature* are subject to CWA NPDES permitting requirements. *Northwest Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176, 1196 (9th Cir. 2010). In finding that an EPA regulation exempting logging from NPDES permitting requirements was invalid, the Ninth Circuit explained: "if [logging] activity is industrial in nature . . . EPA is not free to create exemptions from permitting requirements for such activity." *Id.* at 1196, *citing NRDC v. EPA,* 966 F.2d 1292, 1304 (9th Cir. 1992).

Brown and prior Ninth Circuit decisions make plain that while EPA has some discretion to define what constitutes an industrial activity, EPA's discretion does not extend to exempting stormwater point source discharges from CWA NPDES regulation that are plainly industrial in nature. The courts independently scrutinize whether an activity is industrial to ensure that EPA respects Congress' plain intent to mandate NPDES regulation of *all* stormwater discharges from industrial sources. *See, e.g., Northwest Envtl. Def. Ctr*, 617 F.3d at 1197; *see also NRDC v. Costle,* 568 F.2d 1369 (D.C. Cir. 1977). Thus, in *NRDC v. EPA*, the Ninth Circuit struck down the exemption in EPA's Phase I regulations of point source discharges from construction sites of less than five acres, holding that because construction activity is industrial in nature, EPA cannot exempt it from NPDES regulation. 966 F.2d at 1306. The court explained that to be subject to NPDES regulation, "[i]t is not necessary that stormwater be contaminated or come into direct contact with pollutants: *only association with any type of industrial activity is necessary*." *Id.* (emphasis added). Similarly, the Ninth Circuit held that stormwater discharges from inactive mines were still subject to CWA NPDES regulation even if EPA had not classified such mines as industrial sources of stormwater discharge. *See Am. Mining Congress v. Envtl. Protection Agency*, 965 F.2d 759, 772 (9th Cir. 1992) ("In the [1987 Water Quality Act], Congress provided a temporary [permitting] exemption for some sources of stormwater discharge, but not for discharges associated with industrial activity"). These decisions recite the extensive CWA legislative history, which makes plain Congress' intent that all discharges associated with industrial activity be subject to NPDES regulation. *See* H.R. Rep. No. 99-189 at 62 (July 2, 1985) ("[we] believe that stormwater associated with industrial areas must be regulated by permit"); H.R. Conf. Rep. No. 1004 at 157 (Oct. 15, 1999) ("The permit requirements of the Clean Water Act respecting [industrial] stormwater discharges are not affected by this amendment"); 133 Cong. Rec. H. 168 (Jan 8, 1987) (Statement of Rep. Strangeland) ("[The 1987 amendments] do[] not provide a specific permit exemption for stormwater discharges associated with industrial activity").

For EPA's regulation at 40 C.F.R. § 122.26(b) to be consistent with the CWA, its legislative history, and Ninth Circuit case law, the State Board may not limit the Permit to only stormwater dischargers from facilities that would be classified as being within the SIC Codes referred to in 40 C.F.R. § 122.26(b)(14)(i) - (xi). 40 C.F.R. § 122.26(b)(14) itself does not expressly exclude non-listed SIC codes from the Multi-Sector permit. *See* 40 C.F.R. § 122.26(b)(14) ("The following categories of facilities are considered to be engaging in 'industrial activity' . . ."). *See also supra.*, Section D.1. In its current form, the Draft Permit invites

arguments that stormwater discharges that are unmistakably industrial in nature yet nonetheless not expressly listed in Attachment A are not covered by the permit. As shown above, under Ninth Circuit precedent, the State Board acting on behalf of the EPA cannot exempt industrial stormwater discharges from NPDES regulation. *See, e.g., Brown*, 617 F.3d at 1194. Rather than inviting arguments that the permit excludes any industrial activities, the State Board should add language clarifying that any facilities engaged in any industrial activity are governed by the permit.

CCKA proposes that dischargers who conduct activities like those conducted by the businesses whose primary or secondary purposes would place them within the SIC Codes listed in 40 C.F.R. § 122.26(b)(14)(i) - (xi) would be subject to the General Permit. *See Brown*, 617 F.3d at 1191 (approving of Judge Patel's expansive construction in *Environmental Protection Information Center v. Pacific Lumber Co.*, 2003 U.S. Dist. LEXIS 25734, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) of EPA's stormwater regulations so as to harmonize the regulation with the CWA's statutory mandates). Under this approach, 40 C.F.R. § 122.26(b)(14)'s recitation of SIC Codes should be read as merely providing illustrative examples of the types of industrial activities that warrant deeming a business subject to the General Permit. The Board should keep the list in Attachment A with an explanation stating that the categories and SIC codes set forth are examples of industrial activities covered by the Permit, and that the Permit is not limited to those SIC codes.

2. The State Board Should Specify Other SIC Categories That Include Significant Pollution or are Plainly Industrial in Nature.

In addition to making sure the list of SIC codes is illustrative rather than exhaustive, CCKA requests that the State Board add a number of additional SIC codes to the list that are plainly industrial in nature. Although specific monitoring results for these industry categories are not yet available, the activities engaged in at these facilities are similar to facilities in listed SIC codes, monitoring of which confirms their potential for discharging polluted storm water. CCKA recommends adding the following SIC Codes to Attachment A's list.

First, SIC Code 5032, which includes Brick, Stone, and Related Construction Materials, should be added. These facilities are defined as "[e]stablishments primarily engaged in the wholesale distribution of stone, cement, lime, construction sand, and gravel; brick (except refractory); asphalt and concrete mixtures; and concrete, stone, and structural clay products (other than refractories)." These facilities almost always involve outdoor storage of construction-related materials. Potential pollution from facilities engaged in bulk storage of these materials is indistinguishable from construction sites. Potential pollutants include TSS, pH, metals (either naturally occurring in the stored materials or from pigments uses to dye, for example, some clay products). Many of these facilities are midway points between a mining operation and a manufacturing facility, both of which are listed in the permit. For example, numerous aggregate and sand distribution facilities around the State are used to store quarried or mined materials for use by nearby cement plants. The potential pollutants from the storage and distribution facilities are the same pollutants already regulated at the quarry or mine site and the cement manufacturing facility. Of course, construction activities are governed by their own

storm water permit. The distribution activities in SIC Code 5032 form an integral component of those industrial activities with similar, potential pollutants that should be specifically listed in the draft permit.

Similarly, a number of other bulk storage facilities involved in industry or storing and distributing materials that are known threats to California's waters should be specifically identified in the draft permit's list of facilities. SIC Code 5085 includes "[e]stablishments primarily engaged in the wholesale distribution of industrial supplies, not elsewhere classified," including for example, industrial sand. Like SIC Code 5032, where such supplies are stored outdoors, they pose similar pollution risks and should be covered by the general permit.

SIC Code 5052 includes facilities engaged in the wholesale distribution of "Coal and Other Minerals and Ores." This category includes "[e]stablishments primarily engaged in the wholesale distribution of coal and coke; copper, iron, lead, and other metallic ores, including precious metal ores; and crude nonmetallic minerals (including concentrates), except crude petroleum." For example, open air coke piles are found in different locations around the State. To the extent facilities in the State are engaged in wholesale distribution of copper, zinc, lead or other metals, given those metals propensity for mobilizing in storm water, such facilities should be specifically listed in the general permit.

Another category of wholesale distribution facilities that handle pollutants already known to pose a threat to California's waters are Farm Supplies Establishments – SIC Code 5191. SIC Code 5191 includes "[e]stablishments primarily engaged in the wholesale distribution of animal feeds, fertilizers, agricultural chemicals, pesticides, seeds, and other farm supplies, except grains. Especially in regard to those facilities engaged in wholesale distribution of agricultural chemicals, fertilizer and fertilizer materials, insecticides, pesticides, and phosphate rock, the storage and handling of these materials may pose threats of significant pollution discharges. Given that vast swaths of the Central Valley's waters as well as almost every creek in the Bay area already are identified as impaired by various pesticides or high nutrient levels, the need to make sure these wholesale facilities are not contributing to those impairments or other localized pollution appears self-evident.

Lumber yards also should be specifically listed in the permit. The pollutants associated with lumber mills or wood-treating facilities, including TSS, COD, copper and other metals. *See* Dep't of Toxic Substances Control, "Sampling and Analysis Study of Treated Wood (Draft)" (July 2008). SIC Code 5031 includes "[e]stablishments, with or without yards, primarily engaged in the wholesale distribution of rough, dressed, and finished lumber (but not timber); plywood; reconstituted wood fiber products; doors and windows and their frames (all materials); wood fencing; and other wood or metal millwork. For those facilities with yards, lumber is generally stored outside with heavy reliance on forklifts and trucks. Copper is likely leached from treated wood stored outdoors. Zinc and other metals will be found in oil dripping from forklifts and other vehicles. These facilities should be specifically listed in the permit.

Each of the above wholesale facilities is the last step in the industrial process to bring products to market. Given their link to the actual manufacturers and their generally larger size,

these facilities are more industrial in nature than commercial. Given their potential pollution threats, they should be specifically listed in the general permit.

The general permit should include service stations, especially those engaged in vehicle maintenance and oil changing. The existing permit and draft permit already note the potential pollution coming off of maintenance and fueling areas of trucking facilities. The same is true for commercial gas stations. Gas stations are identified as SIC Code 5541. "Gasoline service stations primarily engaged in selling gasoline and lubricating oils. These establishments frequently sell other merchandise, such as tires, batteries, and other automobile parts, or perform minor repair work." SIC Code 5541. Every Basin Plan in the state prohibits any visual sheen on surface waters. It is a common site to observe oil stains and spills adjacent to garages and fueling areas at gas stations. The permit should specifically list these facilities.

Lastly, the draft permit identifies SIC Codes 40XX (except 4221-25) and 5171 as governed by the permit if they "have vehicle maintenance shops, equipment cleaning operations, or airport deicing operations." Draft Permit, Att. A. In addition, the permit then limits its application to the portions of those transportation facilities involved in vehicle rehabilitation, mechanical repairs, painting, fueling and lubrication. All transportation facilities and all areas of such facilities should be included, not just those with fueling and maintenance activities. All of the transportation facilities listed in the SIC codes are industrial in scale. All storm water associated with those facilities, including portions of the facility used for parking vehicles, are associated with the industrial activity that occurs at the facility. Indeed, oil and grease as well as metals deposited on these sites are just as likely to come from the parked vehicles as any prescribed maintenance or fueling areas. Certainly with regard to trucking, railroads, and airports, each of these facilities is industrial in scale and involved in transporting bulk materials that are still part of industrial activity rather than the sale of a finished product.

E. BMPs Designed to Only a 10-Year, 24-Hour Storm Event Are Not BAT/BCT.

The permit proposes to establish a "Compliance Storm Event" as a 10-year, 24-hour storm event for TSS. Draft Permit, V.E; *Id.*, VIII.C.3. In addition, the permit proposes that "all treatment BMPs for any other pollutants shall be designed for no less than a 10-year, 24-hour storm event." *Id.* The Fact Sheet does not provide an explanation of the basis for the proposed storm events. CCKA agrees that the general permit should establish a specific compliance storm event that assures facilities' treatment facilities and BMPs are properly sized to address pollution in all but the largest storm events and that suspends numeric effluent limitations during such large storm events. However, this permit requirement also must be established based on the BAT and BCT criteria. Looking to the best performing facilities throughout the state, the most effective and achievable storm design for such facilities is a 25-year, 24-hour storm event.

It is not clear to CCKA why the proposed permit differentiates between TSS and other pollutants. Presumably, staff's proposal is based on a belief that addressing TSS may not require BMPs or treatment designed to accommodate a certain size storm event. CCKA does not believe this is the case. Facilities should be required to apply BMPs – including treatment where necessary – to all flows from its facility up to a certain size storm event.

Members of CCKA and CSPA have direct experience with this permit component, having negotiated a number of settlements with facilities throughout the State which include a compliance storm event. The consent decrees for several of the best-performing facilities establish a 25-year, 24-hour storm event as the minimum design standard for BMPs and treatment equipment. *See, e.g. California Sportfishing Protection Alliance v. Sims Group U.S.A. Corporation*, Case No. 2:05-CV-02382-GEB-DAD, Consent Decree (March 29, 2007) (providing for a retention and infiltration system at scrap metal yard capable of handling a 25-year/24-hour storm); *California Sportfishing Protection Alliance v. Oldcastle Precast, Inc.*, Case No. 2:07-CV-02534 WBS JFM (Settlement Agreement) (Dec. 3, 2008) (storm water retention system designed to 25-year/24-hour storm event). In addition, storm water treatment systems – including non-industrial facilities – have been installed or proposed in the Tahoe Basin that will capture greater than 50-year storm events. *See, e.g. http://www.boulderbayresort.com/pdf/TMDL_Reduction_Plan.pdf* (treatment and infiltration of 100-Year, 1-Hour storm). *See also* California Regional Board Water Quality Control Board, Lahontan Region, Water Quality Control Plan, p. 5.6-1 (even for non-industrial storm water dischargers, "[t]he 'design storm' for stormwater control facilities in the Lake Tahoe Basin is the 20-year, 1-hour storm").

A 25-year, 24-hour compliance storm event is reasonably achievable. In its hearing comments, CASQA appears to correlate the proposed compliance storm event as directly proportionate to the size of treatment systems that may be necessary for some facilities to comply with numeric action levels (NALs) and NELs. *See* CASQA Testimony, pp. 34-35. CASQA's claim fails to account for the fact that any storm event standard would require treatment equipment and BMPs to be sized proportionate only to the area of a facility actually discharging pollutants. A true BAT-based compliance storm event would encourage every facility to minimize the exposure of pollution sources to rain in the first place. No matter how sophisticated a treatment system may be, locating pollution sources indoors or under roofing will always be more effective. The smaller the facility, the more feasible roofing or enclosures become. Even if complete covering is not possible, a facility may still cover its more significant pollution sources. Thus, although the facility may be required to achieve NALs and NELs for the entire facility for storm events less than or equal to the compliance event, even where treatment is necessary to achieve NALs or NELs, that treatment would be limited to a portion of the facility, reducing its size accordingly. Where a facility has routed cleaner storm water away from its pollution sources or moved those sources undercover, where treatment is necessary to achieve the NALs and NELs, it would be focused on a smaller area of the facility.

For those facilities where it is infeasible to move all of its pollution sources indoors or under roofing, the 25-year, 24-hour compliance storm event is still feasible. Even assuming the facility must install a full media treatment system, the facility may limit the size of the treatment unit by providing rainwater storage facilities consistent with the compliance storm event size.

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F. The Permit Should Not Contain Any Exclusions Based upon the Implementation Of LID or Other Measures That May Not Prove Effective in Most Industrial Contexts.

The State Board should not carve out an exception for facilities using low-impact development (LID)/green infrastructure (GI). The Fact Sheet proposes a vague process for granting exclusions from all or part of the permit based on the implementation of LID and GI design features. Fact Sheet, p. 35. The Fact Sheet claims that "[t]he best way to minimize pollutants and prevent pollution problems associated with storm water runoff from industrial activities is to design (or redesign) the facility using low impact development (LID) or green infrastructure (GI) techniques." *Id.*

To begin, CCKA supports the use of LID, especially in development and redevelopment projects. CCKA agrees with the California Ocean Protection Council, for instance, which has strongly endorsed LID last by "resolv[ing] to promote the policy that new developments and redevelopments should be designed consistent with LID principles" because "LID is a practicable and superior approach ... to minimize and mitigate increases in runoff and runoff pollutants and the resulting impacts on downstream uses, coastal resources and communities." California Ocean Protection Council *Resolution of the California Ocean Protection Council Regarding Low Impact Development*, p. 2 (May 15, 2008).

In order to justify an exception to the permit's requirements based on an industrial facilities use of LID/GI techniques, however, the State Board's decision must be accompanied by findings that allow the court reviewing the order or decision to "bridge the analytic gap between the raw evidence and ultimate decision or order." *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. Currently, the Permit's proposal to allow some form of exemptions for facilities claiming to have installed effective LID/GI measures is not supported by necessary evidence, and the Board has failed to explain its decision.

While LID/GI techniques can have a place in some properly-designed facilities, their use does not translate to excluding BMPs from the permit. For example, to the extent LID refers to infiltration basins, such features should be monitored and controlled within the proposed permit or with individual permits. Infiltration is not the same as treatment. Simply allowing polluted water to flow into the ground can end up transferring the pollution problem to groundwater. Such BMPs normally would include pretreatment and, unless treated to NELs, should involve as much or more monitoring than discharges to surface water, including lysimeter monitoring.

It also is not clear from which of the permit's proposed requirements such facilities would be relieved. If it is the monitoring requirements that staff has in mind, eliminating those provisions would simply make it unable for the State Board to determine with any objectivity whether the LID and GI features are effective at reducing the industrial facility's storm water pollutants. If staff is thinking the exception would provide relief from the numeric limitations, that approach would entirely defeat the permit's purpose of reducing storm water to levels based on BAT and complying with water quality standards. Even a facility incorporating LID and GI cannot be allowed to release pollutants above the applicable BAT/BCT limitations and still be in compliance with the CWA. Attempting to use the industrial permit as a vehicle to promote LID

and GI is an effort to fit a square peg in a round hole. Given the resource limitations of the State and regional boards – especially when it comes to implementing the stormwater programs – it is entirely unrealistic for the State Board to burden either its staff or regional board staff with another exclusion process. The State Board should leave these policy inducements to efforts outside of the permit requirements.

A true BAT-based permit with numeric effluent limitations driving the implementation of treatment facilities, aggressive roofing and coverage and other effective BMPs, will encourage those facilities predisposed to more holistic design approaches to consider and apply LID and GI where it may prove effective. To the extent a facility has sufficient space and the intensity of its operations may allow the effective use of LIDs or GIs, use of those measures still does not provide any rationale for excluding facilities from the permit's monitoring and reporting requirements or, in particular, numeric effluent limitations.

G. The Permit's Proposed Monitoring Scheme Should Be Strengthened.

A rational and effective monitoring program is absolutely critical if the proposed permit is going to improve on the gaps in the existing permit. Although some of the draft permit's monitoring proposals appear well-intentioned, CCKA believes the monitoring requirements need to be adjusted to address the following concerns.

1. Quarterly Sampling Scheme Should Be Adjusted for the Majority of the State Where Essentially No or Very Little Rain Falls Outside of the Wet Season.

CCKA disagrees with the Draft Permit's proposal to require all dischargers to collect storm water samples from a qualifying storm event during each calendar quarter. Draft Permit, ¶ X(A). This ignores the reality of annual rainfall patterns throughout California. The vast majority of California, including the geographic regions where industrial dischargers are concentrated, experiences a Mediterranean climate characterized by wet winters and dry summers.[7] There is hardly any rain throughout the entire state outside of the wet season as defined by the current General Permit (June through September).[8] The sampling scheme proposed in the Draft Permit would cover few qualifying storm events in the 2nd Quarter (April, May, June) and close to zero during the 3rd Quarter (July, August, September). *See id.* CCKA thus proposes that the Board continue the current policy of requiring storm water sampling

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[7] See http://iaspub.epa.gov/urbanbmp/index.jsp?action=bmpSearch, a site maintained by the EPA which helps stormwater managers identify BMPs based partially on a particular ecoregion. The map shows that the majority of California is typified as "Mediterranean California." *See* The New Oxford American Dictionary (Oxford Univ. Press 2d ed.), p. 1055 (defining "Mediterranean climate" as "a climate distinguished by warm, wet winters under prevailing westerly winds and calm, hot, dry summers, as is characteristic of the Mediterranean region and parts of California, Chile, South Africa, and SW Australia").

[8] See http://www.emwd.org/learning/rainfall/cal_rain_y.html which presents a comparison of monthly rainfall compiled by the National Climatic Data Center for rainfall from a thirty-year period throughout the entire state.

during the wet season as defined from October 1 through May 30. General Permit, ¶¶ B(4)(a), B(5)(a). ***CCKA agrees with the Board's proposal to require four storm water sampling events per year, but that the year must be limited to the confines of the wet season, so that the four sampling events each provide useful information***. For those regions of the state that regularly experience meaningful rainfall throughout the entire year, a quarterly sampling scheme would be useful—but only with respect to those geographic regions.

2. The Expectation that All Facilities Will Properly Maintain and Review an On-Site Rainfall Measurement Device Is Overly Optimistic – Monitoring Should Be Conducted When Discharges Are Occurring Based on Government Rainfall Devices.

To best meet the goal of the proposed monitoring program of helping dischargers evaluate BMP effectiveness by determining whether pollutants are being discharged, the permit must contain stronger provisions to ensure that dischargers sample the requisite amount of discharges – namely to take samples when discharges are occurring. The qualifying events and reporting specifications in the current permit have given dischargers a loophole to easily bypass the sampling requirements. Specifically, CCKA has reviewed hundreds of Annual Reports where dischargers fail to conduct any monthly visual observations or take any storm water discharge samples simply by saying that there were no qualifying events. Modifying the definition of qualifying storm events to require dischargers to maintain an onsite rainfall measurement device and conduct sampling based on specific measuring of rainfall will continue this pattern; it is a recipe for failure. Draft Permit, ¶ X(E)(1).

Official government rainfall measurement devices and associated hourly rain data are readily available near nearly every industrial site.[9] Requiring discharges to maintain their own rainfall measurement devices would be complicated to track, unreliable, rife with potential for human error or tampering, onerous for many smaller dischargers that have fewer employees, and duplicative of data easily obtained from established weather stations. Moreover, besides requiring dischargers to employ them, the draft permit and Fact Sheet do not offer any further guidance or comments regarding rainfall measurement devices, exacerbating the confusion. Draft Permit, ¶ X(E)(1); Fact Sheet, p.6.

CCKA believes that requiring dischargers to use onsite-measured rainfall data to determine what constitutes a qualifying storm event is a layer of abstraction that would interfere with the required sampling of storm water discharges – the primary way that dischargers can determine whether pollutants are being discharged. Rather, dischargers should sample storm water and conduct visual observations when discharges are occurring. Sections X.E.1 and X.E.2 of the draft permit should be changed to read: "A qualifying storm event is a discharge of storm water that occurs 1. From a storm event that has produced any discharge of storm water from the facility ~~a minimum of 1/4 inch of rainfall as measured by an on-site rainfall measurement device~~,

[9] *See e.g.* http://www.ipm.ucdavis.edu/WEATHER/SITES/, a University of California site that provides links to access precipitation and other climate data from weather stations in every county in California.

and 2. Dry weather shall be defined as two consecutive days (48 hours) ~~of combined rainfall of less than 1/8 inch as measured by the closest an on-site rainfall measurement device or rain dates~~ where no discharges have occurred from the facility." Like the current General Permit, if there are discharges occurring preceded by two consecutive days without a discharge, then a storm event would be considered qualifying.

To remedy the potential for dischargers to abuse the Permit and avoid taking samples by simply writing on their Annual Reports that there were no qualifying events, CCKA proposes that whenever dischargers claim there are no qualifying storm events during a month, they must submit all rainfall data derived from nearby weather stations to corroborate that no rain occurred in the area.

3. Increasing Qualifying Storm Events by Only Requiring That an Event Be Preceded by Two Consecutive Days of Dry Weather Is Warranted; However, No Previous Dry Days Should Be Required after March 1 of Each Wet Season.

CCKA agrees that a qualifying storm event should be defined as being preceded by two consecutive days of dry weather (when the facility is operating), rather than three days as currently required. Draft Permit, X.E.2. However, in order to ensure that a facility collects four samples during the rainy season, after March 1 of each wet season, the definition should be amended to eliminate the requirement of two dry days prior to a storm event. As demonstrated above, far less rainfall is observed throughout the state during March through May. To meet the goal of monitoring discharges for pollutants, CCKA's proposal would increase the likelihood that a discharger will monitor and sample discharges during this latter portion of the wet season, when rain is less likely or may only come in a few spurts of consecutive days.

4. CCKA Agrees That the State Board Should Eliminate the Group Monitoring Provisions.

CCKA agrees that group monitoring would not comport with the improved training baseline in the Draft Permit and would allow many facilities to avoid the sampling and analysis that is the key method to determine compliance with BAT/BCT. Fact Sheet, p. 6. Group monitoring prevents many dischargers from having to demonstrate their own performance. CCKA has observed many facilities that are part of group monitoring plans that appear contaminated and lacking in crucial BMPs. Most of these dischargers have conducted little to no storm water sampling, and thus it is impossible to hold them accountable to a lack of BMPs that approximate BAT/BCT. The group monitoring provision has thus interfered with water quality protection; CCKA agrees that it should be eliminated.

5. The State Board Needs to Expand the List of Parameters to Address All of the Pollutants Likely to Be Discharged from Certain Facilities.

CCKA has regularly reviewed data from dischargers in certain SIC categories which consistently discharge storm water containing additional parameters than those listed in Table 2 of the Draft Permit, which mirrors Table XX of the current General Permit. For example,

dischargers in the SIC Category 4953 – "Landfills & Land Application Facilities" – are required to monitor only for the additional parameter of iron. However, CCKA has observed at least three dischargers in SIC Category 4953 who have regularly discharged parameters other than iron in excess of the NAL values in Table 4 of the Draft Permit. Keller Canyon Landfill, in Pittsburg, has regularly observed excess levels of chemical oxygen demand.[10] West Contra Costa Sanitary Landfill, in Richmond, has regularly observed excess levels of copper, lead, zinc, and chemical oxygen demand.[11] Central Valley Waste Services, in Lodi, has regularly observed excess levels of zinc, aluminum, and chemical oxygen demand.[12] Therefore, at a minimum, dischargers in SIC code 4953 should be additionally monitoring for chemical oxygen demand, zinc, copper, aluminum, and lead.

Facilities within SIC Code 3399, classified as "Miscellaneous Primary Metal Products," should be required to monitor additional metals. Although not as common a category as SIC Code 4953, the one facility that the groups have encountered measured levels of aluminum, iron, zinc and manganese above EPA's benchmark values. *See* Valimet, Inc., WDID 5S391000261, 2009-10 Annual Report (June 28, 2010).

The existing permit does not specify any additional parameters for the "Ship and Boat Building and Repairing" –SIC Code 3732. The Waterkeepers and CSPA have encountered a number of boat yards, all of which consistently measure several metals in their storm water discharges, including high levels of copper, lead, zinc. The presence of these metals is not surprising. Copper and zinc are both primary ingredients in boat hull paints. Lead also is common in hulls and keels. Because boat construction, maintenance, and repair is virtually certain to generate these pollutants on a regular basis, a number of existing stormwater permittees actively monitor for copper, lead, and zinc in their stormwater discharges, pursuant to the existing permit's requirement to "Collect and analyze samples of storm water . . . pollutants which are likely to be present in storm water discharges in significant quantities." Annual reports showing Region 2 permittees currently sampling for copper, lead, or zinc include:

- BAE, San Francisco: copper, lead, zinc (2009, 2010)
- Bay Marine, Richmond: copper, lead, zinc (2009, 2010)
- KKMI, Sausalito: copper, lead, zinc (2010)
- KKMI, Pt. Richmond: copper, lead, zinc (2009, 2010)
- Nelson's Marine, Alameda: copper, lead, zinc (2009, 2010)
- San Rafael Yacht Harbor: zinc (2009, 2010)

While these facilities did comply with the permit by sampling for copper, lead, and zinc, the 14 other boat yards in Region 2 did not. Moreover, San Francisco Baykeeper has taken the following samples from other area boat yards showing high levels of copper, lead, and zinc:

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[10] WDID 207S006887. See 2005-2006, 2006-2007 Annual Reports. Note that, likely as a result of additional BMPs worked out with CSPA, the most recent annual report for this facility shows COD levels have reduced to below the draft permit's proposed NAL and NEL.
[11] WDID 207I005532. See 2009-2010 Annual Report.
[12] WDID 5S39I002193. See 2008-2009, 2009-2010 Annual Reports.

- December 13, 2010: Cu 68,000 ug/L, Pb 2,600 ug/L, Zn 15,000 ug/L
- December 14, 2010: Cu 1,100 ug/L, Pb 34 ug/L, Zn 260 ug/L
- December 14, 2010: Cu 7700 ug/L, Pb 810 ug/L, Zn 780 ug/L

Because widespread evidence shows that copper, lead, and zinc are likely to be present in significant quantities in stormwater discharges from boat yards, each boat yard permittee must be required to monitor for these pollutants.

In addition, the Permit should specify that refuse vehicle maintenance and storage facilities, refuse container maintenance and storage facilities, and refuse transfer facilities should be required to sample storm water discharges from their facilities for pollutants associated with operations at their facilities, including, in addition to the basic parameters: E. coli, fecal coliform, total coliform, BOD, COD, aluminum, copper and zinc. These facilities are usually identified under SIC Code 5093. On occasion, some facilities with these activities may list SIC Code 4212. The presence of coliform in refuse containers is common from disposal of bacterial sources of waste. The presence of trucks, metal bins, and fork lifts and other equipment that frequently drip oil and other lubricant or expose metal to storm water also will frequently result in detectable levels of aluminum, copper, zinc and possibly other metals at these facilities.

One last category that the groups have come across which should include additional specified monitoring parameters is SIC Code 3273 – "Concrete, Gypsum, and Plaster Products (Except Lime)." The current permit only requires iron in addition to the basic parameters. Although the groups have not encountered a lot of these types of facilities, the one that CSPA has worked with measured high levels of aluminum and N+N (Nitrate & Nitrite Nitrogen). *See* Syar Industries, Inc., Lake Herman, WDID 248I005112, 2007-2008 Annual Report & 2008-2009 Annual Report.

6. No Reductions in Storm Water Sampling Frequency Should Be Included in the Permit.

CCKA refutes the Board's claim that a discharger whose samples are in compliance for ten consecutive quarters with qualifying events would not pose a significant threat to water quality. Fact Sheet, pp. 28-29. Through CCKA's and CSPA's close review of data from hundreds of dischargers, it has observed a number of instances where dischargers have had consecutive years of storm water sampling with all pollutant levels in compliance and then suddenly began observing discharges with high levels of pollutants. Significantly, the sampling event with the exceedances was not always the first sample of the wet season (*i.e.* the first discharge after October 1). With frequent inconsistencies in discharges and anomalies in sampling, the first sample may not be representative of the actual level of pollutants coming off a particular facility. Thus, the Board's proposed sampling reduction scheme of permitting dischargers to sample only the first qualifying event after October 1 annually could permit a discharger to continue negatively impacting water quality while slipping under the radar of the Permit's monitoring scheme.

CCKA sees no usefulness in the reduced sampling proposal – annual sampling would not demonstrate anything meaningful in terms of water quality protection and at best would allow dischargers a way to avoid a requirement to take affirmative action regarding the actual impact of their storm water discharges. Conditions and practices frequently change at industrial facilities, and CCKA's proposed requirement to collect four annual samples of storm water discharges during the rainy season (*see* Section G.1 *supra*) would not be difficult or expensive for facilities that are already required to have developed detailed monitoring programs with qualified personnel to implement them. Moreover, as demonstrated above in Section G.1, there is only a small likelihood that there would be qualifying storm events in each quarter (there is usually no rain observed during the summer months, for example), so there is little potential that any discharger would experience ten consecutive quarters with qualifying events and hence qualify for this reduction.

7. The Permit Should Not Allow Monitoring from Separate Drainages at a Facility to Be Combined.

CCKA opposes the Board's proposal for combining samples from separate drainages. Such combinations would not be representative of discharge quality and would only serve to mask the potential pollutants contained in storm water discharges. Draft Permit, ¶ XII(B). The proposal does not take into account the size of a drainage area, whereby excess levels of pollutants from a larger drainage area could be mixed and watered down with cleaner and smaller drainages. Moreover, in some instances, different drainages may be flowing towards different water bodies, and the ability to measure potential downstream effects of the particular discharges would vanish in this scheme. Just as dischargers are required to visually monitor each discharge's location and to observe all drainage areas prior to an anticipated storm event, so should they be required to sample and analyze the discharges from each drainage area. That is the best method to ensure water quality protection.

8. Photographs Documenting Implementation of Physical BMPs Should Be Required to Be Submitted with Each Annual Report.

CCKA proposes that dischargers should be required to take representative photographs of all physical BMPs and include them as attachments to their annual reports. CCKA has reviewed numerous Annual Reports where a discharger indicated that it was updating their facilities with certain BMPs one year, only to report that it was planning to put the same BMPs in the following year's Annual Report. A photograph requirement would keep dischargers honest with respect to the physical BMPs being installed at their facility. It would be simple for the QSP or other facility personnel to take such pictures as part of their regular visual monitoring. Further, this would help relieve the burden on the Regional Boards who are tasked with reviewing data from hundreds of dischargers and have limited resources to conduct physical investigations.

9. Sampling Should Not Be Limited to "Scheduled Facility Operating Hours."

The draft permit continues the current permit's provision that no samples need be taken outside of a facility's "scheduled facility operating hours." Draft Permit, § X.F (sampling "only

applies during scheduled facility operating hours"). CCKA proposes that this sampling exception be deleted from the permit.

CCKA and CSPA are frequently surprised at the number of rain events that occur outside of a facility's scheduled operating hours. Many facilities interpret this requirement to those hours when the facility is open to the public, rather than the hours employees are actually at the facility. The consistent absence of monitoring data in some facility's files suggested on occasion that the facility's scheduled hours fluctuated with the rain forecasts. The operating hours exception is one of the leading excuses that facilities have to avoid sampling their discharges. Staff attempts to address this shortcoming by including on-site rainfall measurements and requiring samples within four hours of a facility's determination that a qualifying storm event occurred. Draft Permit, § X.F & n. 3. However, as noted above, CCKA is concerned that the on-site rain gauge proposal will not function as smoothly as staff may desire.

Given that every facility has identified specific personnel or contractors to conduct the monitoring required by the permit, CCKA does not see any logistical reason why the facilities cannot arrange to have samples pulled whenever a significant rain event occurs, even outside of the facility's scheduled operating hours. Rather than have a employees or consultants on call, a facility may choose to install automatic samplers to cover those times where no employees are at a facility.

H. CCKA Agrees with the Proposed Storm Event Design for No Discharge Certification, but the No Discharge Exclusion Should Be Verified Through Appropriate Photographic and Visual Monitoring in Addition to Certification.

The draft permit provides for facilities to submit annual no discharge certifications that would relieve those facilities from the permit's discharge and monitoring requirements. Certification could be submitted by "[d]ischargers who have facilities designed to contain a 100 year 24-hour storm event and three (3) consecutive 20 year 24 hour storm events in a month are not found to have a potential to discharge pollutants, and therefore pose no threat to water quality." Draft Permit, § XII. CCKA believes the second prong of this no exposure standard should be adjusted to require three consecutive 25-year, 24 hour storm events in a month, consistent with the BAT storm design discussed above. In addition, such facilities should still be required to conduct visual monitoring backed up with photographs demonstrating that the containment features are not discharging any stormwater.

I. The State Board Should Clarify That the 90-day Public Comment Period for New Coverage Notices Does Not Alter the Federal Prerequisite for a Citizen to Bring an Enforcement Action Under the CWA.

The general permit is enforceable by third parties pursuant to the Clean Water Act's citizen suit provision. 33 U.S.C. § 1365. The State Board has no authority to alter the 60-day notice procedure established by Congress in the CWA, including requiring comments on SWPPPs or other implementation components prior to a citizen filing a citizen enforcement action. Currently, given the lack of staffing at the regional boards in the storm water program,

third parties play a critical role in implementing and enforcing the existing general permit. CCKA's ability to assist the Board in enforcing and implementing the permit relies upon the federal citizen suit provision. CCKA would like to assure that any procedures proposed by the Board for the public to comment on facility's compliance with the permit do not inadvertently undermine or place road blocks in front of the federal citizen suit provision or their existing rights to petition the boards.

The State Board should add language to the Fact Sheet or proposed permit making it clear that, should a citizen fail to provide comments during the 90-day comment period on new coverage notices, the absence of comments does not waive that person's ability to petition a regional board at any time to question a facility's implementation of and compliance with the permit. Additional permit language also should make it clear that, by not submitting comments, an individual does not waive any objections they may have to the facility's SWPPP. The State Board also should make it clear that, by providing the initial comment period, the permit does not intend to alter in any way the notice requirements of the CWA.

J. Facilities Should Be Required to Submit Revised SWPPPs to SMARTS, and All Documents Submitted to SMARTS Must Be Accessible Via SMARTs to the Public.

The State Board must assure that all key documents required by the permit are posted to SMARTs and available to the public. In addition to the initial SWPPP, notice of intent package, subsequent sampling results, annual reports and evaluations, dischargers must be required to submit to SMARTS any updated SWPPPs within a specified number of days from the date of revision. If the current SWPPP is unavailable electronically, the public's right to question its validity either before a regional board or as part of a citizen enforcement action is seriously undermined. Without ready access to the current SWPPP, citizens "would be without means to enforce the terms of the nutrient management plans because they lack access to those terms. This is unacceptable." *Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486, 503-504 (2d Cir. 2005). Although, unlike the nutrient management plans in *Waterkeepers*, the State Board's proposed permit includes numeric effluent limitations and more specific details of the SWPPP that, together, do not leave the necessary measures entirely to the discretion of the dischargers, a facility's SWPPP will nevertheless provide additional measures, some of which may be unique to a facility. Like any other permit requirement, those fine-tuned measures should be known to the regional boards and the public and should be readily enforceable.

The permit also should specify that all documents submitted to SMARTS, as well as any notices of violations or other enforcement-related documents, are posted ***publicly***. Currently, the permit provides for the dischargers to submit various documents electronically, but does not require that the State and regional boards make those documents available for public review on SMARTS. By expressly requiring public posting online, which should be straightforward for electronically submitted documents, staff will save resources currently expended by staff responding to numerous Public Records Act requests or otherwise fielding document requests from the public.

K. The Recommended Permit Amendments Are Essential to Ensure Clarity and Equity of Implementation and Enforcement.

As described in CCKA's comment letter to the State Water Board dated February 17, 2005, and as is still eminently true today, clear permit language is essential in order to ensure meaningful implementation and full, fair enforcement. "[O]ne of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits . . . ." Memorandum from Terry Tamminen, Cal/EPA to Cal/EPA BDOs, "Enforcement Initiative" (Nov. 30, 2004). The State Water Board's most recent Enforcement Report notes that "[m]ost non-reporting violations in the storm water program are discovered through site inspections," but that "[e]nsuring that . . . controls are adequate for the nearly 25,000 permitted stormwater permittees would require a large field presence" – which is unlikely to surface in the near future. State Water Resources Control Board, "Annual Enforcement Report: 2009," pp. 35, 72 (May 2010).)

The numbers in the State Water Board's most recent Annual Enforcement Report illustrate critical need for the State Board to adopt staff's proposed NELs without the delays embodies in the corrective action levels. Of the 9,476 industrial facilities reviewed in the report, only 5% were inspected – translating to 20 years on average to visit each of them only once (assuming no staff cuts). *Id.* at 34. This process would take significantly longer in some regions; for example, only 1% of regulated facilities were inspected in Regions 3, 5 South, 7 and 9. *Id.*

Of the 503 Facilities inspected statewide in 2009, enforcement staff found 1,132 violations, and 1,085 of these received enforcement action, or 2.16 enforcement actions per inspection on average. *Id.* at 36. Based on this rate of enforcement, if all of the 9,476 facilities were inspected, staff would be acting on approximately 20,468 violations annually. Given that only 1,085 violations that occurred actually received enforcement (the others were overwhelmingly ignored because of a lack of staff to do the inspections required), only about 5% of likely violations received needed enforcement action - which means that ***95% of enforceable violations go ignored each year on average.*** Even where enforcement occurred, such actions were generally weak. Specifically, there were no recorded time schedule orders, cleanup and abatement orders, 13267 orders, or cease and desist orders, and there were only 15 penalty actions total. Finally, the report concludes that given the lack of site inspections, "most of the violations noted are reporting violations" – but ***fully a quarter of the regulated facilities did not submit even their required annual monitoring reports***. *Id.* at 33, 35. This demonstrates the spill-over of a lack of visible, meaningful enforcement efforts to other aspects of facilities' required operations.

Rather than futilely relying on unavailable PYs to enforce the proposed Permit's unnecessarily vague provisions, CCKA recommends that the State Board revise the proposed Permit to, among other things, delete the numerous proposed exceptions and unnecessary corrective action layers and adopt the proposed NELs without delay to provide greater certainty to regulated entities, the regulators and the public. In this way, the industrial stormwater permit would more closely reflect the NPDES permits of other facilities, "where the majority of discharge violations are found through a review of SMRs submitted by the dischargers," rather than through staff-intensive site inspections. *Id.* at 35.

CONCLUSION

Historically, industrial facilities have been allowed to "clean" their facilities with rain events by simply letting storm water direct their pollutants into the nearest drain or stream. Although the existing permit has made progress in re-educating industrial facilities to understand that they are legally responsible for preventing discharges of polluted storm water, many facilities still have not implemented storm water controls commensurate with the levels of pollution that they discharge into the public's waters. Staff's proposal has done an admirable job at addressing many of the shortcomings being experienced under the existing general permit. With the above changes outlined in this comment letter, CCKA believes that the new general permit would be able to achieve the goals of a streamlined permit that would be clear and enforceable, and that would assure that industrial facilities' storm water discharges contribute to achieving, rather than violating, the water quality standards for California's rivers, streams and ocean waters. Thank you.

Sincerely,

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Enclosures:

- Letter from Matthew Hagemann to Michael Lozeau, "Comments on the Draft California NPDES Industrial General Permit" (April 28, 2011)
- Matthew Hagemann Curriculum Vitae
- DTSC, "Sampling and Analysis Study of Treated Wood (Draft)" (July 2008)
- BAE Systems, San Francisco Ship Repair, "Annual Report for Storm Water Discharges Associated with Industrial Activities" (2009-10)
- Syar Industries, Inc., Lake Herman Quarry, "Annual Report for Storm Water Discharges Associated with Industrial Activities" (2007-08)
- Syar Industries, Inc., Lake Herman Quarry, "Annual Report for Storm Water Discharges Associated with Industrial Activities" (2008-09)
- Valimet, Inc., "Annual Report for Storm Water Discharges Associated with Industrial Activities" (2009-10)